IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-6423

ABBY GAIL LASSITER,

Petitioner,

vs.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the North Carolina Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF OF NORTH CAROLINA CIVIL LIBERTIES UNION AS AMICUS CURIAE AND BRIEF AMICUS CURIAE

NORTH CAROLINA CIVIL LIBERTIES UNION

BY: Douglas A. Scott
Robert S. Payne

CENTRAL CAROLINA LEGAL SERVICES, INC.
Post Office Box 3467
Greensboro, North Carolina 27402
Telephone: (919) 272-0148

Counsel for Amicus Curiae

INDEX

Pages

MOTION..... iii

TABLE OF AUTHORITIES..... vi

SUMMARY OF ARGUMENT..... 1

ARGUMENT..... 4

I. TERMINATION OF PARENTAL RIGHTS PROCEEDINGS INVOLVE THE MOST FUNDAMENTAL OF RIGHTS IN OUR SOCIETY - FAMILY INTEGRITY..... 4

II. THE RESPONDENT'S CHARACTERIZATION OF THE STATE'S ROLES AS PARENS PATRIAE WHILE ACTING IN DEPENDENCY, NEGLECT AND ABUSE CASES, AND IN LOCO PARENTIS ACTING IN TERMINATION OF PARENTAL RIGHTS CASES IGNORES THE REALITY OF THE TERMINATION PROCEEDING AND MISAPPLIES PARHAM v. J.R., ___ U.S. ____, 99 S.Ct. 2493 (1979).... 8

III. APPOINTMENT OF COUNSEL IN TERMINATION OF PARENTAL RIGHTS CASES VINDICATES THE INTEREST THAT ALL PARTIES HAVE IN INSURING THE LEGITIMACY OF THE STATE'S OBLIGATION TO PROTECT ITS CITIZENS..... 16

IV. PARENTS UNREPRESENTED BY COUNSEL RISK ERRONEOUS DEPRIVATION OF THEIR PARENTAL RIGHTS BECAUSE OF THE COMPLEXITY OF THE PROCEEDING, AND THE STATE RECOGNIZES THE COMPLEXITY BY PROVIDING COUNSEL TO ALL PARTIES THROUGHOUT JUVENILE PROCEEDINGS EXCEPT FOR PARENTS AT TERMINATION..... 22

INDEX

Pages

V. THE CHARACTERIZATION OF A PROCEEDING AS CIVIL OR CRIMINAL IS NOT DETERMINATIVE OF THE NEED FOR COUNSEL..... 31

CONCLUSION..... 34

APPENDICES..... A-1
B-1

MOTION

It is hereby respectfully moved pursuant to Rules 36 and 42 of the Rules of this Court that the above-named Amicus Curiae be granted leave to file the accompanying brief in support of Petitioner.

Consent to such filing has been requested and obtained from Petitioner and refused by Respondent. Letters granting and refusing consent have been filed with the Clerk of this Court.

The interest of the Amicus Curiae is as follows:

The North Carolina Civil Liberties Union (NCCLU) is an affiliate of the American Civil Liberties Union. Membership in the NCCLU is approximately 2,200; in the American Civil Liberties Union, approximately 225,000. The NCCLU is a private, non-partisan organization engaged exclusively in the defense of the United States Constitution. The NCCLU has an interest in the preservation of the family unit - an entity recognized as fundamental to our society under the Fourteenth Amendment to the United States Constitution - and the right to counsel of indigent parents in termination proceedings in which the fami-

lial unit maybe severed.

In the accompanying brief, the Amicus Curiae will address in more detail than Petitioner and Respondent the following issues: the Respondent's characterization of the State's roles as parens patriae while acting in dependency, neglect and abuse cases, and in loco parentis acting in termination of parental rights cases ignores the reality of the termination proceeding and misapplies Parham v. J.R., ____ U.S. _____, 99 S.Ct. 2493 (1979); the risk of erroneous deprivation of parental rights of unrepresented parents because of the complexity of the termination proceeding and the States recognition of this complexity by providing counsel to all parties except parents at termination and the characterization of the termination proceeding as civil or criminal with respect to the need for counsel. Amicus Curiae will also discuss from a wider perspective than Petitioner or Respondent the need for the appointment of counsel in termination of parental rights proceedings in order to legitimize the State's obli-

ation to protect citizens.

Respectfully submitted,

NORTH CAROLINA CIVIL LIBERTIES UNION

DOUGLAS A. SCOTT
ROBERT S. PAYNE

BY: _____

CENTRAL CAROLINA LEGAL SERVICES, INC.
Post Office Box 3467
Greensboro, North Carolina 27402

Telephone: (919) 272-0148

Counsel for Amicus Curiae

TABLE OF AUTHORITIES

CASES:	Pages
Argersinger v. Hamlin, 407 U.S. 25 (1972).....	33
Boddie v. Connecticut, 401 U.S. 371 (1971).....	17,18
Danforth v. State Department of Health & Welfare, 303 A.2d 794 (Me. 1973).....	22
Davis v. Page, 618 F.2d 374 (5th Cir. 1980), rehear. en banc ganted.....	6,22,23, 24,34
Gideon v. Wainwright, 372 U.S. 335 (1963).....	33
In the Matter of Lassiter, 43 N.C. App. 525, 259 S.E.2d 336 (1979).....	12
In Re Gault, 387 U.S. 1 (1967).....	3,31
Johnson v. Zerbst, 304 U.S. 458 (1938).....	33
Matthew v. Eldridge, 424 U.S. 319 (1976).....	7
May v. Anderson, 345 U.S. 528 (1953).....	5
Meyer v. State of Nebraska, 262 U.S. 390 (1923).	5,8,20
Parham v. J.R., ___ U.S. ___, 99 S.Ct. 2439 (1979).....	2,4,8,9, 10,11,13 14,16
Pierce v. Society of the Sisters of the Holy Name, 268 U.S. 510 (1925).....	5
Powell v. Alabama, 287 U.S. 45 (1932).....	3,33
Quilloin v. Walcott, 434 U.S. 246 (1978).....	5
Roe v. Wade, 410 U.S. 113 (1973).....	6
Skinner v. Okalhoma, 316 U.S. 535 (1942).....	5
Stanley v. Illinois, 405 U.S. 645 (1972).....	2,4,5,22
Wisconsin v. Yoder, 406 U.S. 205 (1972).....	5

TABLE OF AUTHORITIES Continued

CASES: Pages

Zablocki v. Redhail, 434 U.S. 374 (1978)... 6

UNITED STATES CONSTITUTION:

Ninth Amendment..... 1

Fourteenth Amendment.....Passim

STATE STATUTES:

North Carolina General Statutes:

§7A-289.22 8,9,19,20,21,22

§7A-289.24 ..... 13,14,B-1

§7A-289.30(a)..... 32, B-1

§7A-289.30(e)..... 32,B-1

§7A-289.32(1)-(6)..... 32,A-1,A-2

§7A-298.29..... 29,30

§7A-542 6,8,11,13,14

§7A-586 22,28

§7A-587 28

§14-316.1 ..... B-3

§14-318.2 ..... A-1,B-2

§14-318.4 ..... A-1,B-2

§14-322 ..... A-1,A-2,B-3

§14-322.1 ..... A-2,B-3

§14-326 ..... A-1,B-2

§49-2 ..... A-2,B-2

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-6423

ABBY GAIL LASSITER,
Petitioner,

vs.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH
CAROLINA.
Respondent.

On Writ of Certiorari to the North
Carolina Court of Appeals

BRIEF FOR THE AMICUS CURIAE NORTH CAROLINA CIVIL LIBERTIES UNION

SUMMARY OF THE ARGUMENT

The family unit is of fundamental importance to the order and stability of our society. Because the family is so fundamental, State intrusions into the family are limited by the Equal Protection and Due Process clauses of the Fourteenth Amendment, as well as the right of privacy established by the Ninth

Amendment. See, Stanley v. Illinois, 405 U.S. 645, 651-652 (1952), and cases cited therein.

Parham v. J.R., ___ U.S. ___, 99 S. Ct. 2493 (1979) suggested that the State may act in loco parentis under some circumstances in caring for children in its custody. The Parham analysis is inapposite when applied to the facts of this case because the termination of parental rights creates a total deprivation of most fundamental rights. When the State seeks to intrude upon the right of a family integrity, it may do so only for the public's good in parens patriae.

Appointment of counsel for indigent parents in termination of parental rights will help legitimate the State's actions and engender public confidence in the accuracy and fairness of the decision. Termination cases are complex as to fact and law and beyond the capacities of the average layman to conduct. The importance of legal counsel to a fair proceeding is recognized by the State in the statutory scheme for protecting children up to, but not including, the final stage -- termination of

parental rights. Whether a termination proceeding is denominated as "civil" or "criminal" can not decide this case: this Court has always looked beyond labels to the nature of the interests at stake to determine the parameters of due process. In Re Gault, 387 U.S. 1, 49-50 (1967). The interest of family integrity is worthy of the most extensive due process proceedures, but no procedure will be meaningful without "the guiding hand of counsel". Powell v. Alabama, 287 U.S. 45, 69 (1928).

ARGUMENT

I. TERMINATION OF PARENTAL RIGHTS PROCEEDINGS INVOLVE THE MOST FUNDAMENTAL OF RIGHTS IN OUR SOCIETY - FAMILY INTEGRITY

The issues raised in this petition involve the most fundamental of associations recognized in this society: the family, and the rights of parents to raise a child in the family setting. This case addresses directly the question of what procedural due process a state must provide indigent parents when the State seeks to terminate the relationship of parent and child permanently. This brief will discuss the significance of Parham v. J. R., _____ U.S. _____, 99 S. Ct. 2493 (1979), a case raising analytical concerns as to whether the State acts in parens patriae or in loco parentis when seeking to terminate parental rights, and the public policy implications of a decision by the Court in this case.

The parent-child relationship is of fundamental importance to the order and stability of our society. In Stanley v. Illinois, 405 U.S. 645, 651 (1972), this Court, quoting from a litany of cases emphasizing the importance of the family, characterized the right to conceive

and raise one's children as: "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923); one of the "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and, a right" far more precious...than property rights, May v. Anderson, 345 U.S. 528, 533 (1953). This fundamental and constitutionally protected interest has been repeatedly recognized by this Court, see, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, supra; Pierce v. Society of Sisters of The Holy Name, 268 U.S. 510 (1925); and Quilloin v. Walcott, 434 U.S. 246 (1978), and the sources of constitutional protection of family privacy are likewise well established.

> The integrity of the family has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390, 399(1923), the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) Stanley v. Illinois, Supra at 651.

This right of family integrity, although traceable to several constitutional provisions, can be generally described as a part of the right

of privacy existing within the constitution. See Roe v. Wade, 410 U.S. 113 (1973). The right to privacy and the particular protected areas it covers have been described as "fundamental." Zablocki v. Redhail, 434 U.S. 374, 384 (1978). Therefore the interests of petitioner in a continuing parent-child relationship which were completely terminated by the North Carolina proceeding at issue here are fundamental rights under the Constitution.[1]

This Court has consistently followed a three-pronged analysis when faced with the issue of how much process is due a protected private interest under the Fourteenth Amendment.

---

1. The North Carolina courts are virtually alone in failing to accord adequate protections in termination cases to vindicate this fundamental right to family intergrity. All but one of the other courts which have considered the question of appointment of counsel for indigent parents in termination or dependency prodeedings have held that appointment is required. N.C. Gen. Stat. §7A-542 requires appointment of counsel for indigents in neglect and dependency proceedings. See cases cited in Davis v. Page, 618 F.2d 374 at 382, footnote 8 (5th Cir., 1980).

Identification of the specific dictates of due process requires consideration of three distinct factors: first, the private interest that will be effected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

This brief will focus upon the significance of the private interest involved to illuminate why it is fundamental and argue that appointment of counsel for indigents will reduce the risk of erroneous deprivation. Failure to require appointment of counsel impacts not only on the risk of erroneous deprivation of a fundamental interest but raises additional considerations of public policy which could defeat the goal the state seeks in each termination case, "to improve the quality

of its citizens, physically, mentally and morally..." Meyer v. State of Nebraska, 262 U.S. 390, 401 (1923).

II. THE RESPONDENT'S CHARACTERIZATION OF THE STATE'S ROLES AS PARENS PATRIAE WHILE ACTING IN DEPENDENCY, NEGLECT AND ABUSE CASES, AND IN LOCO PARENTIS ACTING IN TERMINATION OF PARENTAL RIGHTS CASES IGNORES THE REALITY OF THE TERMINATION PROCEEDING AND MISAPPLIES PARHAM v. J.R., _____ U.S. _____, 99 S.Ct. 2493 (1979).

Respondent characterizes North Carolina's differing treatment of neglect and dependency cases, N.C. Gen. Stat. §7A-542, and termination of parental rights cases, N.C. Gen. Stat. §7A-289.22 as being based upon "different needs, interests, legislative purposes, parties, and procedures..." Resp. Brief in Opp. at 7. Respondent seeks to base this differing treatment of indigent persons on the conclusion that where neglect and dependency proceedings are brought by the State through the local Department of Social Services, the State is acting in parens patriae but where the State seeks to terminate parental rights, it is acting in loco parentis. Respondent further concludes that this perceived

difference in procedures mandates radically differing concepts as to the level of due process required.

We could not disagree more with Respondent's conclusion. A close review of Parham v. J.R., supra, and the actual circumstances under which a termination of parental rights occurs under N.C. Gen. Stat. §7A-289.22 et seq. will reveal that the State cannot properly claim to be acting in loco parentis when terminating parental rights, that the purported distinction between "civil" and "criminal" actions is without substance in this area, and that the power of the State acting in parens patriae motivated this termination, as it does virtually all other terminations brought in North Carolina.

Parham v. J.R. concerned the conflict between the "broad parental authority over children", Parham v. J.R., ___ U.S. ___, at ___, 99 S. Ct. at 2504, and the substantial liberty interest of the child in not being confined for unnessary medical treatment. Supra at 2503.

Procedural due process was required because the State's involvement with the committment procedure constituted State action. Supra. This Court concluded that procedural due process would be satisfied and the risk of error reduced by a neutral fact finder inquiring as to whether the statutory requirements for committment were met. Supra at 2506.

Special attention was paid to the capacities by which parents, or the State as guardian of a ward, sought the committment. This Court concluded, in summary, that the State could act in loco parentis in committing its ward because of a statutory presumption that the State would act in the child's best interest but that the procedures required to review the ward's need for continuing care might be different from those used to review a child with natural parents because, inter alia, of the risk that a ward of the State might be "lost in the shuffle." Supra, 2512-13.

Respondent adopts this analysis to support its contention that the State's role in a

termination proceeding is that of a parent. This approach ignores the unique facts of Parham and it erroneously assumes that of the Department of Social Services is an ordinary litigant in this proceeding, exercising no more or less power or authority than any other parent.

A review of the background of this case will help illuminate the interests involved. Respondent filed a petition to terminate Ms. Lassiter's parental rights. Resp. Brief in Opp. 1. The child had been in the custody of DSS since May 1975 after a legal determination that the child was neglected. Order Terminating Parental Rights of September 1978, App. 5. The child had continuously been in foster care under the custody of DSS since that time. Supra. There can be no question that DSS obtained custody through the exercise of its authority in parens patriae to protect children under N. C. Gen. Stat. §7A-542 et seq. Judge Martin of the North Carolina Court of Appeals characterized this very proceeding as an exercise "of the police power [of] the State to intervene between parent and child..." In the

Matter of Lassiter, 43 N. C. App. 525, 259 S.E.2d 336 at 337 (1979).

When the State, through DSS, acts to protect the child from abuse, neglect or want of essentials of life, the state has properly exercised its parens patriae power to achieve a state goal. After the state has obtained custody of the child, there are few who doubt that the exercise of steps in the child's best interest taken by the state are done in loco parentis. But when the state seeks to terminate parental rights, considerations beyond the child's best interest are raised. Until that point, DSS has clearly acted as its employees believed best for the child - in the same sense as the Georgia DSS sought hospitalization for children in its care.

But the total severance of all relations with the biological or legal parents of a child introduces wider concerns than just the best interest of a child in the narrow sense of food, medication or care. The termination decision

irrevocablely severs the family unit, a relationship which merits the highest constitutional consideration. This constitutionally protected interest in family integrity has not been before the trial court in any of the previous considerations and has not been a motivating concern for DSS in its care of the child. To allow DSS to assert that they are acting only like any other parent in a termination seeking what is proceeding best for the child ignores DSS's statutory duties to "preserve and stabilize family life" and to help persons become more adequate parents. N.C. Gen. Stat. §7A-542. No private litigant under N.C. Gen. Stat. §7A-289.24 has these duties. No private litigant obtains custody and control of a child through the State's resources and pariens patriae authority. Further, Justice Brennan, concurring in part and dissenting in part in Parham v. J.R., supra at 2522 noted that:

> The rule in favor of deference to parental authority is designed to shield parental control of child rearing from State interference. See Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)...
>
> The social worker - child relationship is not deserving of the special protection and

deference accorded to the parent-child relationship and State officials acting in loco parentis can not be equated with parents. See O'Connor v. Donaldson, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

The essential, inescapable distinction between the case and the idealized situation presented by the Respondent based on Parham v. J.R. is that DSS would never be in the position to claim that they sought to terminate Petitioner's parental rights by acting in loco parentis (or in any other capacity) had DSS not previously exercised the power of the State in parens patriae to obtain and keep custody and control of the child. Had the State not previously obtained custody of the child under N. C. Gen.Stat. §7A-542 et seq. while acting in parens patriae, under the facts of this case DSS would not be a proper party to initiate a termination proceeding. N. C. Gen. Stat. §7A-289.24.

The question as to what standard of due process is required when the State is not involved in a termination is not before this Court. The intimate involvement of DSS with the

child as a result of a State intrusion into the family and the use of an adversarial judicial proceeding where employees of the State acting in their offical capacities, including an attorney, are the moving parties and primary adverse witnesses establish beyond the question that the State is officially involved in the matter. To accept the contention that DSS is only concerned with the child's best interest is unrealistic. By initiating a petition to terminate parental rights, DSS by implication admits failure in its duties towards the parent and natural family. It is not unreasonable to conclude that the presentation of the case in a manner designed to present the parent in the worst light will legitimate the bureaucratic decision to terminate and disquise a failure of DSS to render effective aid to the parent. As termination proceedings brought by DSS are very often for the purposes of a planned adoption of the child, an interest of DSS which cannot be ignored is the shifting of financial responsibilities for the child from DSS (in the form of payments to foster parents) to the proposed adoptive parents.

Parham v. J.R. reached an appropriate result under the limited facts of that case. But the interests in this case which are similar to Parham stop when DSS files the petition to terminate. Authority in loco parentis exercised by the State ceases when fundmental rights of the family - parent and child - are threatened by State action. The State must act in parens patrie to intrude into the most sensitive of protected interests.

III. APPOINTMENT OF COUNSEL IN TERMINATION OF PARENTAL RIGHTS CASES VINDICATES THE INTEREST THAT ALL PARTIES HAVE IN INSURING THE LEGITIMACY OF THE STATE'S OBLIGATION TO PROTECT ITS CITIZENS

Two themes run through this analysis. One theme has been addressed, supra: that the family is the fundamental unit of our society. This is apparent from the perspective of dry legal analysis of the Fourteenth Amendment and from the strong emotional commitment that most people in this country attach to maintenance of the family unit. This strong commitment to family integrity is also expressed in the negative by suspicions of any destructive State intrusion into the family unit.

The other theme, implicit in the discussion of interests and procedural safeguards, is a fear that has exisited since the founding of this nation of unchecked governmental power. As Justice Black said in Boddie v. Connecticut, 401 U.S. 371 (1971), this is a political system where "...wise men [have] sought to draw a written constitution to protect the people from governmental harassment and oppression, who feared alike the king and king's judges..." 401 U.S. at 393. This Court is aware of the ever increasing power of government over the lives of its citizens, and the resultant distrust and suspicion engendered by this intrusion. The legal system and the Courts have shared in this erosion of confidence.

These themes now merge in the case before the Court: the power of the state is being used to irrevocably sever a family, the fundamental unit of this society. When the power of the state is thus employed, the stage is set for the strengthening of the "fear of the king and king's judges."

As a general proposition, when the state intrudes upon protected interests of its citizens,

it must do so with circumscribed methods. This is true not only because of the constitutional implications of such intrusions, but also because our entire society is based upon the concept of checks upon the governmental power and the rule of law. Though writing in a slightly different context, Justice Harlan stated the principle as follows:

> It is the Courts... That we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through the years of adjudication put flesh upon the due process principle.
> Boddie, supra, 401 U.S. at 375.

Thus in order for the action of the State to be perceived as legitimate, the State must act in a manner perceived as fair and just by its citizens.

This is not only a matter of constitutional analysis, but a matter of the perceptions that enable us to maintain an ordered society.

That the State, acting in good faith and upon the obligations imposed upon it,[2] (whether denoted as parens patriae, or in loco parentis,)

---

2. North Carolina's legislative policy with respect to termination of parental rights is expressed as follows: N.C. Gen. Stat. §7A-289.22. Legislative intent; construction of Article.-The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

(2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict.

(4) This Article shall not be used to circumvent the provisions of Chapter 50A, the Uniform Child Custody Jurisdiction Act. (1977, c. 879 1979, c. 110, s. 6)

must continue to intrude upon the familial relationship is unquestioned. That "the state may do much, go very far, indeed, in order to improve the qualty of its citizens, physically, mentally and morally...", Meyer v. State of Nebraska, 262 U.S. 390, 401 (1923), is beyond dispute. The salutory purposes to be served by the termination statute as set forth in N.C. Gen. Stat. §7A-289.22 are worthy goals deserving of continued State activity. But seen in this light, the interests of all parties to the action are ultimately the same -- legitimization of a proper State activity. In order for the purposes set forth in N. C. Gen. Stat. §7A-289.22 to be ultimately vindicated, the procedure by which the State effectuates those purposes must be fair. Where the two themes - the sanctity of the familial relationship and distrust of State institutions (used in the widest sense to encompass the judicial system) converge, the procedures needed to insure fairness become of the utmost importance. These procedures must be fair not only to satisfy due process standards and insure a fair result in a judicial proceeding, but to insure that each time the State intrudes

into the family unit and terminates the parent-child relationship, the public at large perceives the intrusion to be legitimate. As will be discussed infra, the assistance of counsel is an essential element of fairness and the perception of fairness. In this larger sense, appointment of counsel serves the State's interests as well as that of the parent and child.

With this ultimate convergence of interests, the only possible objection the State could have to the appointment of counsel is the fear of increased cost or of interference with the efficiency of the termination process. Even in pursuit of the laudable goals of N. C. Gen. Stat. §7A-289.22 there are restraints on the procedures to be utilized by the State:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may

> characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
> Stanley v. Illinois, 405 U.S. 645, 656 (1972).

As will be developed further, infra, parental rights cases are complex factually, legally, emotionally and constitutionally. The potential loss to the parent and child is great. But the loss to the society as a whole is even greater if, in a proceeding where there are never winners, the unchecked exercise of State power leads even one citizen to believe that proceeding was unfair. That type of damage may never be undone.

IV. PARENTS UNREPRESENTED BY COUNSEL RISK ERRONEOUS DEPRIVATION OF THEIR PARENTAL RIGHTS BECAUSE OF THE COMPLEXITY OF THE PROCEEDING, AND THE STATE RECOGNIZES THIS COMPLEXITY BY PROVIDING COUNSEL TO ALL PARTIES THROUGHOUT JUVENILE PROCEEDINGS EXCEPT FOR PARENTS AT TERMINATION.

A proceeding to terminate parental rights is complex in terms of both evidentary and substantive law. The parent is faced with "[T]he full panoply of the traditional weapons of the state" Danforth v. State Department of Health & Welfare, 303 A.2d 794, 799 (Me. 1973). The Court in Davis v. Page, 618 F. 2d 374 (5th Cir. 1980), rehear. en

banc granted, succinctley describes the power and arrayed against the parent:

> The state is represented by the state attorney; it has access to public records concerning the family and to the services of social workers, psychiatrists, and psychologists. These representing the state have experience in legal proceedings and the ability to examine witnesses, present evidence, and argue skillfully that the child should be adjudicated dependent. 618 F. 2d at 380.

Faced with this is a parent who is not trained in the substantive and procedural law, and who does not have at his or her fingertips the rules of evidence that would be needed to stem the evidentiary tide of the state. The Court in Davis again states the result:

> Unless the indigent parent has the tools necessary to oppose the state's expert presentation, a finding of dependency could be based partially upon inadmissible hearsay, improper opinion evidence, or evidence irrelevant to the issue of dependency. A determination of dependency might be founded upon testimony that a skilled attorney would expose as biased or untrue. The parent may have a defense sufficient to prevent an adjudication of dependency, which he or she is unable adequately to present. Davis, supra at 381.

These are not imagined concerns. In the case before the Court, a substantial part of the evidence addressed by the State was in the form of social welfare records which were not authenticated as business records exceptions to the hearsay rule. Further, the very statutory framework upon which the state relys to bring this termination action has a built-in bias that a skilled cross-examiner could detect, i.e. the State, acting through its Social Services agencies has already determined that its interests would be best served by terminating parental rights. It is highly unlikely that the State will bring forth evidence that is not supportive of the end which it seeks. This proceeding is not one where the State as a disinterested party comes before the Court in a benign effort to seek the truth wherever it may lead. The State is in fact pursuing an end which it has already determined, and it scarcely can be relied upon to contradict itself. Again, the Davis Court sums up the reality of the proceeding:

> The value of counsel in a dependency proceeding is inestimable. The words of the

Court in Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) explaining the need for counsel in criminal cases, are equally descriptive of the plight of a parent in a dependency proceeding:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the preceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. Davis, supra at 381.

The state itself recognizes the complexity of the termination procedure. Interwoven throughout the juvenile statutory scheme is the mandate by the State that the participants in the process be represented by counsel. There is one place in the scheme where an indigent participant is deprived of counsel. It is at this point where

the ultimate and irrevocable sanction is applied to the family unit - final severance of the parent-child relationship. For the State to say that counsel is necessary at all other steps of its intrusion into the family, and then to maintain that, at the point of the ultimate intrusion, the parent may go unrepresented, defies logic and ignores the admonition of the legislature to protect all children from the unnecessary severence of a relationship with biological or legal parents. N. C. Gen. Stat. §7A-289.22 (2). An examination of these statutes shows the importance the State attaches to participation of counsel.

N. C. Gen. Stat. §7A-586 requires the appointment of an attorney, licensed to practice law in the State of North Carolina, as guardian ad litem for the juvenile where there are allegations of abuse or neglect.[3]

---

3. §7A-586. Appointment of guardian ad litem.-When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile. The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family

The statute mandates sweeping investigatory powers for the guardian ad litem, in addition to

---

and community to meet those needs; to appear on behalf of the juvenile in the court proceeding and to perform necessary and appropriate legal services on his behalf; to present relevant facts to the judge at the adjudicatory hearing and to explore options with the judge at the dispositional hearing; to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge; and to appeal, when advisable, from an adjudication or order of disposition to the Court of Appeals.

The judge may order the Department of Social Services or the guardian ad litem to conduct follow-up investigations to insure that the orders of the court are being properly executed and to report to the court when the needs of the juvenile are not being met. The judge may also authorize the guardian ad litem to appear with the juvenile in any criminal action wherein he may be called on to testify in a matter relating to abuse.

The guardian ad litem shall be an attorney-at-law, licensed to practice in the State of North Carolina. In no case may the judge appoint a public defender as guardian ad litem. The judge may grant the guardian ad litem the authority to demand any information or reports whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. Neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem and no disclusure of any information or reports shall be made to anyone except by order of the judge. (1979, c. 815, s. 1.)

admonishing him to render "appropriate legal services on his (the child's) behalf" and "to appeal, when advisable, from an adjudication or order of disposition to the Court of Appeals." It is manifest that the State sees the participation of counsel on behalf of the juvenile as essential to a fair and just result.

In cases where there are allegations of abuse, neglect or dependency, N.C. Gen. Stat. §7A-587 mandates the appointment of counsel for indigent parents.[4] It is interesting to note that the statute requires appointment in dependency proceedings although a similar requirement is not made with respect to the guardian ad litem under N.C. Gen. Stat. §7A-586. This indicates the realization by the State that any intrusion into the family unit as parens patriae must be clothed with procedural protections and the further realization that the parent is assumed to be acting in the best interests of the child and

---

4. §7A-587. Parent's right to counsel.-In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. (1979, c. 815, s.1.)

thus is accorded, procedurally, protection of counsel in dependency proceedings even where a guardian ad litem is not required for the child.

As has been discussed in detail supra, the distinction that the respondent seeks to make between dependency, neglect and abuse proceedings and termination proceedings is meaningless -- both involve severing the family unit. Thus the recognition by the State of high importance of counsel in the process in dependency, neglect, and abuse proceedings points up the anomaly of not requiring such an appointment in termination proceedings -- the parent's hour of greatest need.

The anomaly of the State's position is further high-lighted when the termination statutes themselves are examined. N.C. Gen. Stat. §7A-298.29 (b) requires the appointment of a licensed attorney as guardian ad litem for the child if there is filed "an answer (denying) any material allegation of the petition, the court shall appoint a licensed attorney as guardian

ad litem for the child..."[5] The fact that a guardian ad litem is appointed only if there is a probability of a truely adversary proceeding again shows the importance that the State attaches to the participation of counsel in the termination proceeding.

And finally, the State itself was represented by counsel in the instant case. Nothing in the record shows that, in fact, the State ever initiates a termination proceeding without the benefit of counsel.

---

5. §7A-289.29. Answer of respondents.-(a) Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition and shall set forth the name and address of the answering respondent or his or her attorney. (b) If an answer denies any material allegations of the petition the court shall appoint a licensed attorney as guardian ad litem for the child to represent the best interests of the child. The Child shall conduct a special hearing after notice of not less than 10 days not more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition and responsive pleading. (1977, c. 879, c. 8.)

V. THE CHARACTERIZATION OF A PROCEEDING AS CIVIL OR CRIMINAL IS NOT DETERMINATIVE OF THE NEED FOR COUNSEL.

This case should not be allowed to turn on the fact that one litigant or the other succeeds in placing the label "criminal" or "civil" on the termination procedure. In determining the parameters of due process this Court has always looked beyond labels to the nature of the interest at stake. In Re Gault 387 U.S. 1,49-50 (1967).

The interest affected by a termination proceedings is analogous to, if not more important than those interests affected in a criminal proceeding:

> Loss of a child is one of the severest possible sanctions that can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than lose the companionship and custody of their children. Davis v. Page, 618 F. 2d 374 (5th Cir. 1980)

In the criminal law, the interest protected is personal liberty from confinement. In this

case, the deprivation is the absolute and permanent loss to the parent of custody, control and companionship of the child. While the loss of liberty is frequently temporary, the loss suffered by the parent is irrevocable. In a criminal case, the defendant is afforded the highest protections of the law -- trial by jury, a clear measure of the standard of prohibited conduct and a decision reached beyond a reasonable doubt -- while in this case trial by jury was not allowed, N.C. Gen. Stat. §7A-289.30 (a), the standard of prohibited conduct is unclear,[6] and the decision reached by the court need only be supported by clear, cogent and convincing evidence. N.C. Gen. Stat. §7A-289.30(e).[7] Further, the same facts which would support a termination could lead to criminal prosecutions.[8]

The line of cases that establish the require-

---

6. See Appendix B, infra, for complete Statute.

7. See Appendix B, infra, for complete Statute.

8. A review of the grounds for termination reveals parallel criminal sanctions in virtually every instance. See Appendix A, infra, for a comparison of specific section of N.C. Gen. Stat. §7A-289.32 with its counter-

ment for court-appointed counsel in criminal cases[9] shed light upon the public policy considerations which mandate appointed counsel in termination of parental rights cases. As the Court said in Gideon v. Wainwright, 372 U.S. 335 (1963):

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assume fair trails before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him. 372 U. S. at 344.

Those same perceptions of fairness which have compelled the courts to surround the criminal proceeding with the strictest safeguards - including the right to counsel - in order to insure acceptance where fundamental rights are at stake compel that those same procedural safeguards attach to termination of parental rights proceedings.

---

part in the criminal statutes.

9. That the right of counsel is fundamental to our judicial system is well established: Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938) and Powell v. Alabama, 287 U.S. 45 (1932).

CONCLUSION

Because of the fundamental nature of the interest in family integrity at issue here, and of the drastic and irrevocable nature of the State's intrusion into that interest, the Amicus Curiae urges that the North Carolina Court of Appeals be reversed, that the case be remanded and that the Petitioner be granted a hearing at which she shall be afforded court-appointed counsel.

Respectfully submitted

NORTH CAROLINA CIVIL LIBERTIES UNION

BY: Douglas A. Scott
Robert S. Payne

APPENDIX A

Grounds for Termination	Criminal Penalty
N. C. Gen. Stat §7A-289.32(2) - abuse or neglect of child by parent.	N. C. Gen. Stat. §14-318.2 - child abuse misdemeanor; statue in addition to other civil or criminal provisions.
	N. C. Gen. Stat. §14-318.4 - child abuse involving serious injury a felony punishable by maximum of 5 year imprisonment; statute in addition to other civil or criminal provisions.
	N. C. Gen. Stat. §14-316.1 - contributing to delinquency or neglect by parents; misdemeanor.
N. C. Gen. Stat §7A-289.32(3) - parents willfully left child in foster care for two years without showing progress in correcting conditions which led to removal of child.	N. C. Gen. Stat. §14-326 mother who willfully abandons minor children; misdemeanor
N. C. Gen. Stat. §7A-289.32(4) - failure to pay reasonable share of cost of care child placed in custody of DSS for six months preceeding	N. C. Gen. Stat. §14-322 - failure to provide adequate support for child; misdemeanor; first offense: maximum of $500 fine or 6

Grounds for Termination	Criminal Penalty
filing of petition	months imprisonment; second offense: fine or maximum of 2 years imprisonment
	N. C. Gen. Stat. §14-322.1 - willful abandonment of children for six months with failure to support and intent to avoid obligation to support; felony.
N. C. Gen. Stat. §7A-289.32(5) - custodial parents seeks to terminate parental rights of non-custodial for failure to support for year preceeding petition.	N. C. Gen. Stat. §14-322; §14-322.1 (as above)
N. C. Gen. Stat. §7A-289.32(6) (d) - natural father of illegitimate child fails to provide support or care for mother and child.	N. C. Gen. Stat. §49-2; failure to putative father to support child, misdemeanor; maximum sentence of 6 months imprisonment.

APPENDIX B

§ 7A-289.30. Adjudicatory hearing on termination. — (a) The hearing on the termination of parental rights shall be conducted by the district court sitting without a jury. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) The court may, upon finding that reasonable cause exists, order the child to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the child's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the child is at issue, the court may order a similar examination of any parent of the child.

(c) The court may for good cause shown continue the hearing for such time as is required for receiving additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interest of the child.

(d) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights of the respondent.

(e) All findings of fact shall be based on clear, cogent, and convincing evidence. No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights. (1977, c. 879, s. 8; 1979, c. 669, s. 1.)

§ 7A-289.24. Who may petition. — A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

(1) Either parent seeking termination of the right of the other parent; or
(2) Any person who has been judicially appointed as the guardian of the person of the child; or
(3) Any county department of social services or licensed child-placing agency to whom custody of the child has been given by a court of competent jurisdiction; or
(4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G.S. 48-9(a)(1); or
(5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition. (1977, c. 879, s. 8.)

§ 14-318.2. Child abuse a general misdemeanor. — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.

(b) The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a). (1965, c. 472, s. 1; 1971, c. 710, s. 6.)

§ 14-326. Abandonment of child by mother.—If any mother shall willfully abandon her child or children, whether legitimate or illegitimate, and under sixteen years of age, she shall be guilty of a misdemeanor. (1931, c. 57, s. 1.)

§ 14-318.4. Child abuse a felony. — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:

(1) Permanent disfigurement, or
(2) Bone fracture, or
(3) Substantial impairment of physical health, or
(4) Substantial impairment of the function of any organ, limb, or appendage of such child,

is guilty of a felony punishable by imprisonment for a period not to exceed five years.

(b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies. (1979, c. 897, s. 1.)

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor. — Any parent who willfully neglects or who refuses to provide adequate support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this Article shall be any person less than 18 years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain if such child were the legitimate child of such parent. (1933, c. 228, s. 1; 1937, c. 432, s. 1; 1939, c. 217, ss. 1, 2; 1951, c. 154, s. 1; 1977, c. 3, s. 1.)

§ 14-322. Abandonment by husband or parent.—If any husband shall wilfully abandon his wife without providing her with adequate support or if any father or mother shall wilfully neglect or refuse to provide adequate support for his or her child or children, whether natural or adopted, whether or not he or she abandons said child or children, he or she shall be guilty of a misdemeanor and upon conviction for the first offense shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court; upon conviction of a second or subsequent offense he or she shall be punished by fine or by imprisonment not exceeding two years, or both, in the discretion of the court; and such wilful neglect or refusal shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen (18) years. (1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; Code, s. 970; Rev., s. 3355; C. S., s. 4447; 1925, c. 290; 1949, c. 810; 1957, c. 369; 1969, c. 1045, s. 1.)

§ 14-316.1. Contributing to delinquency and neglect by parents and others. — Any person over 16 years of age who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7A-517 shall be guilty of a misdemeanor.

It is not necessary for the district court exercising juvenile jurisdiction to make an adjudication that any juvenile is delinquent, undisciplined, abused, or neglected in order to prosecute a parent or any person, including an employee of the Department of Human Resources under this section. An adjudication that a juvenile is delinquent, undisciplined, abused, or neglected shall not preclude a subsequent prosecution of a parent or any other person including an employee of the Division of Youth Services who contributes to the delinquent, undisciplined, abused, or neglected condition of any juvenile. (1919, c. 97, s. 19; C. S., s. 5057; 1959, c. 1284; 1969, c. 911, s. 4; 1971, c. 1180, s. 5; 1979, c. 692.)

§ 14-322.1. Abandonment of child or children for six months. — Any man or woman who, without just cause or provocation, wilfully abandons his or her child or children for six (6) months and who wilfully fails or refuses to provide adequate means of support for his or her child or children during the six months' period, and who attempts to conceal his or her whereabouts from his or her child or children with the intent of escaping his lawful obligation for the support of said child or children, shall, upon conviction thereof, be guilty of a felony and punished in the discretion of the court. (1963, c. 1227.)